Fordham Urban Law Journal

Volume 3 | Number 2 Article 4

1975

Note: Going Public with Discriminating Private Clubs

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NOTES

GOING PUBLIC WITH DISCRIMINATING PRIVATE CLUBS

The private club has been recently besieged with complaints and challenges attacking its very nature—exclusivity. Despite such challenges, the United States Supreme Court has frequently expressed the notion that there is a right to discriminate.[1] This right, however, is qualified, and has not been accorded affirmative constitutional protection.[2] The purpose of this Note is to analyze post-*Moose Lodge* case law and theories to determine when exclusion, despite abridgement of associational rights, becomes illegal discrimination. In addition, new theories and laws will be proposed to deal with discrimination by private clubs.

I. Recent Court Decisions

There are two major categories of court cases concerning private clubs—those dealing with racial discrimination and those concerning sex discrimination. The theories and laws for evaluating and remedying racial discrimination are broader, more numerous, and

1. *See, e.g.*, Gilmore v. City of Montgomery, 417 U.S. 556, 573-74 (1974); Norwood v. Harrison, 413 U.S. 455, 463 (1973); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179-80 (1972) (Douglas, J., dissenting); Bell v. Maryland, 378 U.S. 226, 313 (1964) (Goldberg, J., concurring).

2. Norwood v. Harrison, 413 U.S. 455, 469-70 (1973). The Court succinctly stated that "[s]uch private bias is not barred by the Constitution, nor does it invoke any sanction of laws, but neither can it call on the Constitution for material aid from the State." *Id.* at 469. The cases which have recognized a fundamental right of association have concerned organizations whose primary function was to express a political ideology. *See, e.g.*, NAACP v. Button, 371 U.S. 415 (1963); NAACP v. Alabama, 357 U.S. 449 (1958); National Socialist White People's Party v. Ringers, 473 F.2d 1010 (4th Cir. 1973). In other cases, the right has been accorded less extensive protection and has even been abridged where the organization's activities are considered unimportant or unworthy of protection by the court. *See, e.g.*, Bryant v. Zimmerman, 278 U.S. 63 (1928). This suggests that associational rights may be abridged in favor of pursuing equality where the associational claims do not embrace highly prized forms of association, such as banding together for the furtherance of political or religious goals.

hence more effective than those for sex discrimination.[3] The Civil Rights Act of 1964, prohibiting racial discrimination in places of public accommodation involved in interstate commerce, as well as the state action doctrine under the equal protection clause—sometimes turning private clubs into "public" ones—is responsible for the greater success in remedying racial discrimination.

Moose Lodge No. 107 v. Irvis[4] involved a black guest at a local chapter of the Moose Lodge, a national fraternal organization, who was refused service at the club's dining and bar facilities. This was allegedly because the club's constitution and bylaws restricted membership to caucasians. Irvis argued that the discrimination violated the equal protection clause of the fourteenth amendment. "State action" was alleged by reason of the Pennsylvania liquor board's issuance to appellant of a private club liquor license. In response to the district court's finding of illegal discrimination in membership and guest policies, the club amended its bylaws to forbid blacks as guests. The United States Supreme Court reversed the district court on the grounds that a guest had no standing to sue on the question of membership[5] and that the state was not sufficiently implicated in the discriminatory guest practices so as to make such practices state action.[6] The Court did concede, however, that the state would be enjoined from enforcing its Liquor Control Board regulation requiring club licensees to comply with club bylaws because as applied to Moose Lodge, that regulation, although neutral in its terms, required state sanctions to enforce a discriminatory private rule.[7]

The club's legal victory was short-lived. A scant six weeks after the decision was handed down, the Supreme Court of Pennsylvania held the Moose Lodge dining room and bar, open to the general

3. *See, e.g.*, Wahba v. New York Univ., 492 F.2d 96, 100 (2d Cir.), *cert. denied*, 419 U.S. 874 (1974); New York City Jaycees, Inc. v. United States Jaycees, Inc., 377 F. Supp. 481, 488 (S.D.N.Y. 1974); Civil Rights Act of 1964, 42 U.S.C. §§ 1981-2000h-6 (1970), *as amended*, §§ 2000c-e, 2000h (Supp. II, 1972).

4. 407 U.S. 163 (1972).

5. *Id.* at 166.

6. *Id.* at 177.

7. *Id.* at 178-79. For an extended discussion of the case, see 41 FORDHAM L. REV. 695 (1973).

caucasian public when accompanied by a member, to be places of "public accommodation." Racial discrimination in such places was expressly prohibited by state law.[8]

The *Moose Lodge* decisions focus attention upon a problem inherent in discrimination cases, namely, the definition and determination of what qualifies as a "private club." Justice Rehnquist stated that "Moose Lodge is a private club in the ordinary meaning of that term."[9] On the same facts, however, the Pennsylvania Supreme Court found that Moose Lodge was a "place of public accommodation."[10] The "ordinary meaning of that term" remains unclear, as other cases and legal commentators indicate.[11] Nevertheless, courts have developed tests to distinguish "public" from "private" clubs.

In *Nesmith v. YMCA of Raleigh*,[12] an early private club discrimination case, a black minister sought and was denied admission to the YMCA on the grounds that he was "insincere." He sought injunctive relief against the discriminatory policies in a class action. The court held that the large size of the organization, the loose membership requirements, and the lack of general participation by members in meetings indicated the organization's "public" status.

To justify racial discrimination in *Daniel v. Paul*,[13] an amusement park claimed "private club" status because patrons were required to pay a twenty-five cent "membership" fee. The Supreme Court denounced the fee as a mere subterfuge designed to circumvent the provisions of the Civil Rights Act of 1964.[14] The Court held that a nonbusiness character, control by members of finances and gover-

8. Commonwealth Human Relations Comm'n v. Moose Lodge No. 107, 448 Pa. 451, 294 A.2d 594, *appeal dismissed*, 409 U.S. 1052 (1972). The Pennsylvania Human Relations Act, PA. STAT. ANN. tit. 43, §§ 951-63 (1964), *as amended*, (Supp. 1974), guarantees the right to freedom from discrimination "because of race, color, religious creed, ancestry, age, sex or national origin" in any place of public accommodation.

9. 407 U.S. at 171.

10. 448 Pa. at 458-59, 294 A.2d at 597-98.

11. *See generally* Note, *"Is It in Fact a Private Club?,"* 2 N.C. CENT. U.L.J. 157 (1970); Note, *Constitutional Law—Private Club Discrimination*, 1970 WIS. L. REV. 595; 23 CATHOLIC U.L. REV. 147 (1973).

12. 397 F.2d 96 (4th Cir. 1968).

13. 395 U.S. 298 (1969).

14. *Id.* at 301-02.

nance, and actual selectivity in admissions policies were prerequisites of private club status.[15]

In *Moose Lodge* on the other hand, the Supreme Court decided that private funding, restricting membership and guest privileges, and conducting all activities in a club-owned building made Moose Lodge a private club.[16] The Court did not consider whether the Lodge's role as a center of community activity meant it was in fact open to the public. More recently, in *Tillman v. Wheaton-Haven Recreation Association*,[17] the Supreme Court recoiled at the notion that a swim club, by deeming itself private, may restrict membership to white residents of a particular geographic area, when purchase of property from a member automatically conferred waiting list preference to purchasers. Similarly, the Second Circuit has rejected number limitations as a criterion of selectivity, stating that "every restaurant or night club limited by law or fire regulations to a given number of occupants at a given time would be magically transformed into a 'private club.' "[18]

Private club status has also been denied where a club enters into an arrangement with local motels whereby the manager of the club allows the motels' customers to use the club facilities as his "guests."[19] State courts have held that organizations cannot be classified as private where they open their doors, albeit for a limited purpose or time, to the general public.[20] When their doors are thus

15. *Id.* at 301. *See also* Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969); Kyles v. Paul, 263 F. Supp. 412 (E.D. Ark. 1967).

16. The Supreme Court of Pennsylvania, in the subsequent decision in Commonwealth Human Relations Comm'n v. Moose Lodge No. 107, 448 Pa. 451, 459-60, 294 A.2d 594, 598 (1972), stated that the Human Relations Act exempted from its requirements only those fraternal organizations which were "distinctly private." By opening its facilities to nonmembers, Moose Lodge lost its "distinctly private" character.

17. 410 U.S. 431 (1973).

18. Olzman v. Lake Hills Swim Club, Inc., 495 F.2d 1333, 1336 (2d Cir. 1974).

19. Anderson v. Pass Christian Isles Golf Club, Inc., 488 F.2d 855 (5th Cir. 1974).

20. *See, e.g.*, Batavia Lodge No. 196 v. New York Div. of Human Rights, 35 N.Y.2d 143, 316 N.E.2d 318, 359 N.Y.S.2d 25 (1974) (where club invited blacks to fashion show on its premises and refused to serve them at bar); Commonwealth Human Relations Comm'n v. Moose Lodge No.

open and they derive the bulk of their funds from sources other than their members, their private club status, for tax purposes, is terminated.[21]

In *Solomon v. Miami Woman's Club*,[22] a nonprofit organization, although engaging in civic affairs, sold neither food nor alcoholic beverages, kept rigid admission standards, owned its own land and clubhouse, and operated its facilities solely for the benefit and use of its members. The court found that while the club had never admitted a black woman, it was not formed for the primary purpose of excluding blacks on account of their race. Based on the facts and the *Nesmith, Moose Lodge*, and *Tillman* tests, the club was deemed "private."

Emerging from the case law, therefore, is a test which scrutinizes the club's membership process, its general character (size, purpose for existence, types of activities), the use of its facilities by nonmembers, the participation of its members in governing the club, and the source of its income.

II. Remedies

A. Equal Protection and State Action Theories

State action must be found in order to invoke the equal protection clause when a club is otherwise deemed to be "private."[23] While there is no clear-cut test for detecting state action,[24] there are three basic "state action" theories which have emerged from the voluminous case law: "public function," "minimal state involvement," and "significant state involvement."[25]

107, 448 Pa. 451, 294 A.2d 594, *appeal dismissed*, 409 U.S. 1052 (1972) (where the court held that allowing public to enter dining room and bar when accompanied by member made facilities "places of public accommodation").

21. *See* Polish American Club v. Commissioner, CCH TAX CT. REP. Dec. No. 32,718(M) (Aug. 6, 1974).

22. 359 F. Supp. 41 (S.D. Fla. 1973).

23. Civil Rights Cases, 109 U.S. 3 (1883).

24. Gilmore v. City of Montgomery, 417 U.S. 556, 574 (1974); Reitman v. Mulkey, 387 U.S. 369, 378 (1967); Nesmith v. YMCA, 397 F.2d 96, 101 (5th Cir. 1968).

25. For a complete examination of state action, see Hemphill, *State Action and Civil Rights*, 23 MERCER L. REV. 519 (1972). *See also* Note,

The first of these, the public function doctrine, holds that a private entity exercising "powers or functions governmental in nature" must conform to the requirements of the fourteenth amendment.[26] No actual involvement by the government in the activity is necessary. Since private clubs are most often organized to promote the social interests of their members and do not engage in activities typically carried on by governments, the public function theory is generally not useful in examining them. In *New York City Jaycees, Inc. v. United States Jaycees, Inc.*,[27] however, the public function theory was relied on to bolster a finding of unconstitutional discrimination. There, the "local" chapter of the national organization, in contravention to the national bylaws, began admitting women to membership. When the national organization took preliminary steps to revoke the local's charter, the local sued to enjoin the revocation. The court held that the Jaycees had changed from a social to a civic organization whose "good deeds are the kinds of activity generally thought of as public functions."[28] Since the funding for these activities was largely governmental, the court found that state action was present and enjoined the revocation of the charter.[29]

Developing Legal Vistas for the Discouragement of Private Club Discrimination, 58 IOWA L. REV. 108, 112-15 (1972).

26. Evans v. Newton, 382 U.S. 296, 299 (1966). The public function theory may prove useful where tax exemptions have been granted. In Jackson v. Statler Foundation, 496 F.2d 623, 634 (2d Cir.), *cert. denied*, 95 S. Ct. 1124 (1974), the Second Circuit stated that the legislative history of the Internal Revenue Code's charitable exemption and deduction may raise the presumption that foundation activities are public functions. It may, however, prove difficult to achieve any extension of this idea to private clubs. The court in *Jackson* detailed the public attributes of private foundations, *id.* at 627 n.6, and such public attributes may be lacking in many private clubs.

27. 377 F. Supp. 481 (S.D.N.Y. 1974). For similar cases attacking the Jaycees, see Junior Chamber of Commerce of Rochester, Inc. v. United States Jaycees, 495 F.2d 883 (10th Cir.), *cert. denied*, 95 S. Ct. 505 (1974).

28. 377 F. Supp. at 489.

29. *Id. But cf.* Solomon v. Miami Woman's Club, 359 F. Supp. 41 (S.D. Fla. 1973), where the court refused to find state action although the organization performed community services. The same court, shortly after *Solomon*, did allude to the public function theory in Golden v. Biscayne Bay Yacht Club, 370 F. Supp. 1038 (S.D. Fla. 1973). Here, the City of

The minimal state involvement theory,[30] in contrast to the public function theory, does not directly curtail the practice of the discriminatory activity, but instead ends the governmental involvement in order to discourage the discriminatory action. Requisite to use of the theory is that the government actually has involved itself at some point, albeit insignificantly, with the activity in issue. Applied to private clubs, minimal involvement can be found in state tax benefits and grants of liquor and food licenses.[31] Despite some conceptual potency, "minimal involvement" in practice is ineffective. The courts refuse to apply the concept because of the pervasive influence of government in virtually all private activity.[32] Furthermore, where protection of first amendment rights of association is involved, the courts are even more reluctant to find state action.[33] Fear of a chilling effect upon associational and privacy rights has led the courts

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Miami leased land to the club and waived use restrictions in order to alleviate the shortage of public dock facilities. The court found that since Miami prohibited its lessees from discrimination on leased premises and the club was enjoying a special privilege, it could not discriminate against blacks and Jews.

30. The theory was first discussed in Shelley v. Kraemer, 334 U.S. 1 (1948), where it was held that court enforcement of a restrictive covenant amounted to impermissible state action under the fourteenth amendment.

31. In theory the granting of a liquor license constituted minimal state involvement in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); the test, however, is disfavored and was not applied in that case by the Court. The granting of tax benefits was held to constitute state action in Falkenstein v. Department of Revenue, 350 F. Supp. 887 (D. Ore.), *appeal dismissed*, 409 U.S. 1099 (1972). *Falkenstein* specifically distinguished tax exemptions from liquor licenses. 350 F. Supp. at 888-89.

32. The cases uniformly hold that state action requires a significant degree of state involvement, as where a symbiotic partnership exists between the state and the private entity or where there is joint participation by the two. *See* Gilmore v. City of Montgomery, 417 U.S. 556, 568-69 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972); Reitman v. Mulkey, 387 U.S. 369, 380 (1967); Weigand v. Afton View Apts., 473 F. 2d 545, 547-48 (8th Cir. 1973); Greco v. Orange Memorial Hosp. Corp., 374 F. Supp. 227, 232 (E.D. Tex. 1974); Ellingson v. Sears, Roebuck & Co., 363 F. Supp. 1344, 1347 (S.D.S.D. 1973). *See generally* Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 660, 672-73 (1974).

33. *See* note 2 *supra* and accompanying text.

consistently to hold that mere regulation is not sufficient to constitute state action.[34]

Due to judicial disfavor of the minimal involvement theory, courts have developed the theory of "significant state involvement."[35] It differs from the minimal involvement analysis primarily in degree. Boundaries of the test are still in flux, changing on a case-by-case basis, because courts have stated that the requisite involvement under the test can be found only "by sifting facts and weighing circumstances."[36] Nevertheless, several common tests have evolved from the cases for finding "state action" under this theory. They include counting the state contacts with the private entity[37] and examining the state-conferred benefits that tend to encourage discrimination.[38] Thus, in a recent case,[39] the court found that the municipality, by waiving land use restrictions for a club, was confer-

34. *See, e.g.*, Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94 (1973); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Northrip v. Federal Nat'l Mortgage Ass'n, 372 F. Supp. 594, 597 (E.D. Mich. 1974).

35. Note, *Developing Legal Vistas For the Discouragement of Private Club Discrimination*, 58 IOWA L. REV. 108, 113 (1972).

36. Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

37. *Id.* at 723-24. A contracts case, Stearns v. Veterans of Foreign Wars, 353 F. Supp. 473 (D.D.C. 1972), involved a female veteran who served actively during World War II and sought membership in the defendant organization. The VFW, chartered by Congress, had a rule against admitting females as members. The court held that Congress did not intend to limit membership to males and that absent any discriminatory language in the charter itself, no significant state involvement in the discriminatory conduct could be said to exist. *Id.* at 476. *See also* Kansas City Junior Chamber of Commerce v. Missouri State Junior Chamber of Commerce, *summarized at* 43 U.S.L.W. 2306 (8th Cir. Jan. 28, 1975) where the court found that governmental funding of specific programs of an organization which admits only males is not a sufficient nexus with the organization to constitute governmental action in the organization's discriminatory actions.

38. *See, e.g.*, Junior Chamber of Commerce of Kansas City v. Missouri State Junior Chamber of Commerce, 508 F.2d 1031 (8th Cir. 1975); Golden v. Biscayne Bay Yacht Club, 370 F. Supp. 1038 (S.D. Fla. 1973); Falkenstein v. Department of Revenue, 350 F. Supp. 887 (D. Ore. 1972), *appeal dismissed*, 409 U.S. 1099 (1973).

39. Golden v. Biscayne Bay Yacht Club, 370 F. Supp. 1038 (S.D. Fla. 1973).

ring a benefit on that club. Another case held that tax exemptions for private fraternal organizations confer a benefit on the organization and involve the state in the discriminatory practice.[40]

Aside from the difference in degree between the two tests, there is a difference in the remedy they trigger. As previously noted, minimal involvement has been only marginally effective.[41] When the doctrine has been applied, courts use it only to remove the governmental action.[42] Its usefulness extends to discouraging the discriminatory practice rather than terminating it. Significant state action, on the other hand, has been used both to remove governmental support and to prohibit directly the discriminatory activity.[43] Thus, the latter theory is a much more useful tool to prevent discrimination.

B. The Commerce Clause

The other traditional means to prohibit discrimination is the commerce clause. The invocation of Congress' commerce clause power requires that the object of congressional legislation be related, at least tangentially, to the movement of goods in interstate commerce or to operations affecting such commerce.[44] This connection is generally difficult to find in truly private club cases where the club serves no food and its facilities are not open to the general public.[45] Thus the Civil Rights Act of 1964[46] applies only when a club is found to be a place of public accommodation,[47] since the move-

40. Falkenstein v. Department of Revenue, 350 F. Supp. 887 (D. Ore. 1972), *appeal dismissed*, 409 U.S. 1099 (1973).

41. *See* notes 30-32 *supra* and text accompanying notes 30-34 *supra*.

42. *See, e.g.*, Lombard v. Louisiana, 373 U.S. 267 (1963); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

43. *See, e.g.*, New York City Jaycees, Inc. v. United States Jaycees, Inc., 377 F. Supp. 481 (S.D.N.Y. 1974); Golden v. Biscayne Bay Yacht Club, 370 F. Supp. 1038 (S.D. Fla. 1973); Bennett v. Dyer's Chop House, Inc., 350 F. Supp. 153 (N.D. Ohio 1972) (involving a public restaurant which discriminated against women).

44. B. SCHWARTZ, CONSTITUTIONAL LAW, 103-08 (1972).

45. *See, e.g.*, Solomon v. Miami Woman's Club, 359 F. Supp. 41 (S.D. Fla. 1973).

46. 42 U.S.C. §§ 1981-2000h-6 (1970), *as amended*, §§ 2000c-e, 2000h (Supp. II, 1972).

47. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).

ment of goods and of interstate travellers may have been curtailed by the discrimination.[48] When the impact of the discrimination is the discouragement of interstate commerce, Congress may legislate to forbid the interference.[49]

C. Federal Civil Rights Acts

The modern methods for dealing with racially discriminatory conduct in the context of private clubs are in the legislative sphere. The Civil Rights Act[50] has proved of immeasurable help in eliminating discrimination, especially since no state action is required to invoke it.[51]

A recent major case brought under sections 1981 (right to sue and contract), 1982 (right to buy property), and 2000a (public accommodations)[52] is *Tillman v. Wheaton-Haven Recreation Association*.[53] In

48. For a discussion of how the commerce clause has been successfully invoked, see discussion of Olzman v. Lake Hills Swim Club, Inc., 495 F.2d 1333 (2d Cir. 1974), in text accompanying notes 60-67 *infra*.

49. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 257-58 (1964).

50. 42 U.S.C. §§ 1981-2000h-6 (1970), *as amended*, §§ 2000c-e, 2000h (Supp. II, 1972).

51. Jones v. Mayer, 392 U.S. 409, 417 (1968); Gonzales v. Fairfax-Brewster School, Inc., 363 F. Supp. 1200 (E.D. Va. 1973).

52. Section 1891 provides: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." 42 U.S.C. § 1981 (1970). Section 1892 provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." *Id.* § 1982. Section 2000a(a)-(e) provides: "a. All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin. b. Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action: (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other

than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence; (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station; (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and (4) any establishment (A) (i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment. c. The operations of an establishment affect commerce within the meaning of this subchapter if (1) it is one of the establishments described in paragraph (1) of subsection (b) of this section; (2) in the case of an establishment described in paragraph (2) of subsection (b) of this section, it serves or offers to serve interstate travelers of a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b) of this section, it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b) of this section, it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country. d. Discrimination or segregation by an establishment is supported by State action within the meaning of this subchapter if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof. e. The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section." *Id.* § 2000a(a)-(e). For a discussion of the interrelationship of these statutes, see Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449 (1974).

Tillman, respondents operated a swimming pool, limiting its membership to three hundred twenty-five families. Membership preference was given to families residing within a three-quarter mile radius. Residents within the preferred area needed no recommendation for membership and were automatically given waiting list preference if the membership was full. A selling homeowner within this area conferred on the purchaser of his property a first option on the vacancy created by his removal and resignation. A black couple purchased a home within the preferred area but were discouraged from applying for membership solely on the basis of their race. After two members later brought a black guest to the pool, the association changed its policy to allow only relatives as guests. The black couple, the two members, and the black guest alleged violations of sections 1981, 1982, and 2000a. They contended that membership constituted a type of personal property or a form of leasehold interest in real property, the ownership of which could not be denied them on racial grounds. The district court found Wheaton-Haven to be a private club exempt from the provisions of the statutes.[54] The Supreme Court reversed, and held that the first option for membership and the automatic waiting list preference may have affected the price paid for the house so that the discrimination diluted and abridged appellants' right to acquire a home in the area.[55] Specifically:

> When an organization links membership benefits to residency in a narrow geographical area, that decision infuses those benefits into the bundle of rights for which an individual pays when buying or leasing within the area. The mandate of 42 U.S.C. § 1982 then operates to guarantee a nonwhite resident, who purchases, leases, or holds this property, the same rights as are enjoyed by a white resident.[56]

The Court further held that Wheaton-Haven was not a private club, since it was open to members of the resident area. Thus, the Court was not required to decide whether the private club exemption in section 2000a(e)—the public accommodations provision of the Civil

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53. 410 U.S. 431 (1973), *rev'g* 451 F.2d 1211 (4th Cir. 1971).

54. The decision is unreported but is referred to in the court's opinion. *See* Tillman v. Wheaton-Haven Recreation Ass'n, 451 F.2d 1211, 1212 (4th Cir. 1971).

55. 410 U.S. at 437.

56. *Id.*

Rights Act—was an implied limitation on the earlier section 1982.[57] Finally, the Court held that since Wheaton-Haven was not a private club it was subject to the provisions of section 1981 (right to sue and contract).[58]

On the unanswered question of whether the section 2000a(e) private club exemption acts as a limitation on section 1982 it has been suggested[59] that section 1982 could be expanded, at least as to guests, by the argument that the section protects the guest's right to "hold" the implied easement or license which a member of a private club wishes to grant him. Since the club is willing to admit any white guest, it could be argued that it is not concerned with protecting access to its facilities.

The theory of a guest having a property right under section 1982 has been upheld by the Second Circuit in *Olzman v. Lake Hills Swim Club, Inc.*,[60] a case whose facts closely parallel those of *Tillman*.[61] The court stated:

> Upon being invited by a member of the club, a black child becomes an invitee of that member with certain rights pursuant thereto. Whether these rights are denominated licenses, easements or usufructs, the guest has an interest in his guest status which the law may protect from certain invasions.[62]

The court also found that under section 1981, when the guest pays a guest fee, a contract arises either between the guest and the club or between the member and the club, to which the guest is a third party beneficiary able to enforce the contract.[63] To prevent the making of such contracts is a violation of section 1981.[64]

Proceeding to discuss section 2000a, the court held that the club was a place of public accommodation, not a private club under section 2000a(e).[65] That the club affected interstate commerce was

57. *Id.* at 438-39. Section 1981 was derived from the Civil Rights Act of 1870, and section 2000 from Title II of the Civil Rights Act of 1964.

58. 410 U.S. at 439-40.

59. Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449, 493-94 (1974).

60. 495 F.2d 1333 (2d Cir. 1974).

61. *Id.* at 1336.

62. *Id.* at 1339 (citation omitted).

63. *Id.*

64. *Id.*

65. *Id.* at 1340.

indicated because it served club luncheons, maintained a snackbar, and had club movie nights, all of which involve goods traveling in interstate commerce. Citing *Katzenbach v. McClung*,[66] the court stated that although the effect upon interstate commerce may be miniscule, the aggregate effect of such discrimination by all clubs, pools, and snackbars was sufficient to make the statute applicable.[67] Thus, *Olzman* strikes the death knell of private club racial discrimination by invalidating it under both the Civil Rights Act and the commerce clause.

Most of the cases dealing with private club discrimination have dealt with sections 1981 and 1982;[68] however, section 1983[69] may also serve as a basis for challenging racial discrimination. An example is a case decided by the Fifth Circuit, *Adams v. Miami Police Benevolent Association*,[70] where black police officers were excluded from membership in a police benevolent association solely on account of race. The court held that notwithstanding the existence of another benevolent association comprised of black officers performing similar functions and reaping similar benefits, the white officers' association, larger and stronger than its companion group, was so entwined with the city police department that its refusal to admit blacks was action under color of state law in violation of section 1983 and the fourteenth amendment.[71]

The Civil Rights Act, then, is a useful mechanism for invalidating racially discriminatory membership practices where the club admits residents of a geographic area (*Tillman*) or where it acts under

66. 379 U.S. 294 (1964).

67. 495 F.2d at 1340.

68. This is so because the first two sections are of broad application, applying to all contractual and property rights, while the third section applies only to actions done under color of law. For the text of the sections, see notes 52 *supra* and 69 *infra*.

69. 42 U.S.C. § 1983 (1970) provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

70. 454 F.2d 1315 (5th Cir.), *cert. denied*, 409 U.S. 843 (1972).

71. *Id.* at 1318-19.

color of state law (*Adams*). Where the club opens its doors to guests, providing services which either involve goods travelling in interstate commerce or which are performed under color of state law (*Olzman*), racially discriminatory guest practices may be invalidated. Since the Act makes no mention of sex discrimination, its effectiveness does not extend to such cases.

D. State Statutes

As previously mentioned, the federal statutes have proven to be a powerful weapon against racial discrimination.[72]

To assure that other forms of discrimination do not remain outside the law's reach, some states have utilized their police power to draft additional antidiscrimination laws. Of particular note are the provisions of the Washington,[73] New York,[74] and Pennsylvania[75] statutes. In addition to race, creed, and color, these laws prohibit discrimination on account of national origin, ancestry, age, and sex. All contain an exemption for clubs which are truly private, but stipulate that if a club opens its doors to the public for a limited purpose, it is deemed to be a place of public accommodation and may not discriminate.[76]

The two major cases dealing with these laws are *Commonwealth Human Relations Commission v. Moose Lodge No. 107*[77] and *Batavia Lodge No. 196 v. Division of Human Rights*.[78] The former case, which was the final disposition of *Moose Lodge*, concerned the lodge's violations of the Pennsylvania Human Relations Act.[79] The question before the court was whether the public accommodations

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72. *See* text accompanying notes 46-51 *supra*.

73. Law Against Discrimination, WASH. REV. CODE ANN. §§ 49.60.010-.320 (1962), *as amended*, (Supp. 1974).

74. Human Rights Law, N.Y. EXEC. LAW §§ 290-301 (McKinney 1972), *as amended*, (McKinney Supp. 1974).

75. Pennsylvania Human Relations Act, PA. STAT. ANN. tit. 43, §§ 951-63 (1964), *as amended*, (Supp. 1974). For an evaluation of the Pennsylvania Human Relations Commission's effectiveness in regulating discrimination in all contexts, see Comment, *Survey: the Pennsylvania Human Relations Commission*, 77 DICK. L. REV. 522 (1973).

76. *See* cases cited note 20 *supra*.

77. 448 Pa. 451, 294 A.2d 594, *appeal dismissed*, 409 U.S. 1052 (1972).

78. 35 N.Y.2d 143, 316 N.E.2d 318, 359 N.Y.S.2d 25 (1974).

79. PA. STAT. ANN. tit. 43, §§ 951-59 (1964), *as amended*, (Supp. 1974).

section of the act[80] was applicable to Moose Lodge's dining and bar facilities where guests of members were admitted. Exempted from the section barring discrimination in public accommodations were "any accommodations which are in their nature distinctly private."[81] The court found that the club was not "distinctly private" because its facilities were open to guests. Any discrimination in such facilities was clearly contrary to state law.[82]

The statute proved a successful vehicle for eliminating discrimi-

80. Section 955 provides that it shall be an unlawful discriminatory practice, unless based upon membership in the case of a fraternal association: "(i) For any person being the owner, lessee, proprietor, manager, superintendent, agent or employe of any place of public accommodation, resort or amusement to (1) Refuse, withhold from, or deny to any person because of his race, color, religious creed, ancestry or national origin, or to any person due to use of a guide dog because of the blindness of the user, either directly or indirectly, any of the accommodations, advantages, facilities or privileges of such place of public accommodation, resort or amusement. (2) Publish, circulate, issue, display, post or mail, either directly or indirectly, any written or printed communication, notice or advertisement to the effect that any of the accommodations, advantages, facilities and privileges of any such place shall be refused, withheld from or denied to any person on account of race, color, religious creed, ancestry or national origin, or to any person due to use of a guide dog because of the blindness of the user, or that the patronage or custom thereat of any person, belonging to or purporting to be of any particular race, color, religious creed, ancestry or national origin, or to any person due to use of a guide dog because of the blindness of the user, is unwelcome, objectionable or not acceptable, desired or solicited. Nothing in clause (h) of this section shall bar any religious or denominational institution or organization or any charitable or educational organization, which is operated, supervised or controlled by or in connection with a religious organization or any bona fide private or fraternal organization from giving preference to persons of the same religion or denomination or to members of such private or fraternal organization or from making such selection as is calculated by such organization to promote the religious principles or the aims, purposes or fraternal principles for which it is established or maintained. Nor shall it apply to the rental of rooms or apartments in a landlord occupied rooming house with a common entrance." *Id.* § 955. The reader should note that subdivision (i) does not contain a reference to sex. Every other subdivision of the section includes sex as an impermissible basis of discrimination.

81. *Id.* § 954(1).

82. 448 Pa. at 460, 294 A.2d at 598.

nation, at least as to guests. While the Supreme Court was reluctant to find state action, the Pennsylvania law provided a workable alternative.

Batavia Lodge likewise involved the discriminatory activities of a Moose Lodge. The club invited blacks to a fashion show on its premises. They were refused service at the bar and were verbally abused. Under the New York law, the Commissioner of Human Rights found sufficient evidence to warrant the imposition of compensatory damages for each complainant.[83] The court upheld the award because of "[t]he extremely strong statutory policy of eliminating discrimination . . . ."[84]

Both cases invalidated discrimination against black guests. At least one state, however, has decided that a private club is not a place of public accommodation and thus may discriminate both as to its members and as to their guests.[85] The Oklahoma law, in comparison with the New York and Washington laws,[86] also fails to include sex as a basis for finding discriminatory practice in public accommodations.[87]

In a recent Oklahoma case, *Oklahoma Human Rights Commission v. Hotie, Inc.*,[88] an interesting question arose as to the interrelation between municipal licensing regulations and the state antidiscrimination law. Oklahoma City had licensed the Onyx Club as a private club for purposes of regulation. The club contended that since it was licensed as private it could not possibly be a place of public accommodation under the state law. Reversing the lower

83. 35 N.Y.2d at 145, 316 N.E.2d at 319, 359 N.Y.S.2d at 26.

84. *Id.* at 146, 316 N.E.2d at 320, 359 N.Y.S.2d at 27.

85. *See* OKLA. STAT. tit. 25, § 1401(1)(i) (Supp. 1974), which provides that "a private club is not a place of public accommodation, if its policies are determined by its members and its facilities or services are available only to its members and their bona fide guests . . . ."

86. The New York law includes sex as a basis of discrimination in public accommodations but expressly states that such discrimination is permissible where there are bona fide considerations of public policy. N.Y. EXEC. LAW § 296(2) (McKinney 1972), *as amended*, (McKinney Supp. 1974). The Washington law simply declares that there is a right to be free from discrimination on the basis of sex in places of public accommodation. WASH. REV. CODE ANN. § 49.60.030(1)(6) (1962), *as amended*, (Supp. 1974).

87. OKLA. STAT. tit. 25, §1402 (Supp. 1974).

88. 505 P.2d 1320 (Okla. 1973).

court's summary judgment for the club, the appeals court stated that the city's determination, made to regulate clubs, did not necessarily preclude a finding that the club was a place of public accommodation under state law.[89]

The "public accommodation" theory has been used in numerous contexts to proscribe otherwise private discrimination.[90] The courts tend to construe the term broadly so as to further state policy of eradicating discrimination.[91] New Jersey has even included Little League, Inc. as a public accommodation. *National Organization for Women v. Little League, Inc.*,[92] involved the typical athletics controversy; girls of eight to twelve years of age were prohibited from playing baseball with boys of the same ages. Little League argued that the girls were more susceptible than their male counterparts to injury.[93] Plaintiffs maintained that the league could not discriminate against girls by reason of the state's Law Against Discrimination.[94] The court concluded from the evidence presented that girls of this age were not as a class subject to greater hazard of injury than boys of the same age.[95] It held that Little League was an "accommodation" which was "public" by virtue of its open admission to all male children in the community.[96] The "place" of public accommodation was the ball field.[97] The court stated:

> The law is remedial and should be read with an approach sympathetic to its objectives. . . . If this organization were not deemed a place of public ac-

89. *Id.* at 1324.

90. *See, e.g.*, notes 80-87 *supra* and accompanying text.

91. *See* Ohio Civil Rights Comm'n v. Lysyj, 38 Ohio St. 2d 217, 313 N.E.2d 3 (1974).

92. 127 N.J. Super. 522, 318 A.2d 33 (App. Div. 1974).

93. Little League, perhaps in anticipation of the disfavor with which the court would greet its "physical difference" argument, also argued that bodily privacy was involved at Little League games. The court caustically rejected this line of argument, stating: "The suggestion that such a hazard [of breach of bodily privacy] is presented when a male coach gives first aid to an injured girl player appears to border on the frivolous." *Id.* at 533, 318 A.2d at 38.

94. *See* N.J. STAT. ANN. § 10:5-12(f) (Supp. 1974).

95. 127 N.J. Super. at 529, 318 A.2d at 36-37.

96. *Id.* at 531, 318 A.2d at 37-38.

97. *Id.* at 530, 318 A.2d at 37.

> commodation it would be free to discriminate on the basis of race or religion as well as sex.[98]

Since the state laws which often provide for the invalidation of sex discrimination are construed liberally, the state courts are the best forum for any challenges in this area. They are likewise effective, as is the Civil Rights Act, for dealing with racial discrimination in private clubs.

E. Tax Exemptions

The tax power of both state and federal government is yet another way to combat discrimination. The Supreme Court recently decided in *Bob Jones University v. Simon*[99] that the Internal Revenue Service may not be enjoined from revoking its ruling letter declaring petitioner school qualified for tax exempt status, or from withdrawing assurance to donors that contributions would be deductible, in light of the IRS decision to deny tax-exempt status for private schools maintaining racially discriminatory admissions policies.[100]

Bob Jones University is devoted to teaching fundamentalist religious beliefs which include the tenet that God intended segregation of the races. Accordingly, the university refused to admit blacks. The Court rejected petitioner's contention that the IRS was attempting solely to regulate the admissions policies of private universities, stating that there was no evidence that the IRS position was not a good faith effort to enforce the tax laws.[101]

This theory was successfully applied to private clubs in *Falkenstein v. Department of Revenue*.[102] In that case, a black was denied membership in the Elks Lodge solely because of his race. He successfully sought to restrain the state from granting tax exemptions to the discriminatory fraternal organization. The court found state action, which was lacking in *Moose Lodge*, because the state

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98. *Id.* (citations omitted).

99. 416 U.S. 725 (1974).

100. Tax-exempt status for private schools is provided for in INT. REV. CODE OF 1954, § 501(c)(3). In 1970, the Internal Revenue Service announced that it would no longer allow tax exempt status under section 501(c)(3) for racially discriminatory schools. *See* Rev. Rul. 71-447, 1971-2 CUM. BULL. 230.

101. 416 U.S. at 740.

102. 350 F. Supp. 887 (D. Ore. 1972), *appeal dismissed*, 409 U.S. 1099 (1973).

relieved the organization from property and corporate excise taxes while the public benefited from the charitable and benevolent activities of the organization.[103] The discriminatory practice therefore violated the equal protection clause and the court enjoined the granting of a tax exemption.[104]

III. Conclusion

Discriminatory private clubs are no longer assured of continued governmental support and protection. Courts and legislatures have increasingly moved to discourage private racial and sex discrimination by deeming organizations public places, by removing tax benefits, by finding impermissible state action, and by regulating interstate commerce.

It is often said that for government to tread in private areas is dangerous precedent.[105] But in our society, clubs play an enormous role both in recreational and economic activities. There is no question but that status attaches to membership in private clubs. A glance at the biographical campaign literature of a "local" candidate for public office frequently reveals a string citation of organizations to which he belongs. It is also generally conceded that business

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103. *Id.* at 888-89.

104. *Id. Falkenstein* has been relied on in Brunson v. Rutherford Lodge No. 547, 128 N.J. Super. 66, 319 A.2d 80 (1974) where it was held that the granting of tax exemptions to the discriminatory Elks Lodge was impermissible state action. The court stated: "The involvement of the State in the granting of a tax exemption of the type involved here is far different from that in granting liquor licenses. In this State it has long been recognized that there is a symbiotic relationship between the State and the exempt organization and that the latter is relieved from the burden of taxation because it is practically performing a public work which the State would otherwise have to perform." 128 N.J. Super. at 85-86, 319 A.2d at 91.

105. This belief is rooted in the notions of right of privacy and association. There are certain areas of private life in which the government ought not to interfere. *See* note 2 *supra* and accompanying text. *See also* Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965); NAACP v. Alabama, 377 U.S. 288, 307 (1958) (regulation may not be so broad as to invade the area of protected freedoms); Boyd v. United States, 116 U.S. 616, 630 (1886) (fourth and fifth amendments protect against governmental invasions "of the sanctity of a man's home and the privacies of life").

decisions are routinely made in clubs[106] which provide a relaxed, informal atmosphere in which to discuss business. To preclude groups from membership in such organizations may effectively inhibit the business success of the group as a whole. Accordingly, it is of the utmost importance that racial, sex, and certain other forms of discrimination be lessened as much as possible, and confined to those few instances where associational rights prevail.[107]

For the courts to pursue such a goal, the legislatures must give them the necessary tools. The continued and expanding use of administrative procedures for the alleviation of discrimination is likewise essential. For an injured party to bring suit is costly and burdensome. Consumer frauds are routinely investigated on the basis of complaint letters by city agencies and attorneys general. There is no reason why discrimination complaints should not be similarly treated and wholeheartedly encouraged by public officials. Governmental support of such "suspect class" discrimination should be curtailed so that nothing but the ordinary services, such as fire protection, water, and electricity are given by the government to discriminatory entities. It is only where sincere efforts are made by all branches of government that such discrimination can be eliminated.

Tina L. Wellner

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106. *See* Cook, *Newark Elite Dine in Style in Private Clubs*, N.Y. Times, Dec. 26, 1973, at 43, cols. 5-8.

107. *See* note 2 *supra*.